



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No: 230620-0153; RTID 0648-XC872]

### Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications; 2023-2024 Annual Specifications and Management Measures for Pacific Sardine

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS is implementing annual harvest specifications and management measures for the northern subpopulation of Pacific sardine (hereafter, Pacific sardine), for the July 1, 2023, through June 30, 2024, fishing year. This final rule will prohibit most directed commercial fishing for Pacific sardine off the coasts of Washington, Oregon, and California. Pacific sardine harvest will be allowed only in the live bait fishery, minor directed fisheries, as incidental catch in other fisheries, or as authorized under exempted fishing permits. The incidental harvest of Pacific sardine will be limited to 20 percent by weight of all fish per trip when caught with other stocks managed under the Coastal Pelagic Species Fishery Management Plan, or up to 2 metric tons per trip when caught with non-Coastal Pelagic Species stocks. The annual catch limit for the 2023-2024 Pacific sardine fishing year is 3,953 metric tons. This final rule is intended to conserve and manage the Pacific sardine stock off the U.S. West Coast.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Taylor Debevec, West Coast Region, NMFS, (562) 619-2052, [Taylor.Debevec@noaa.gov](mailto:Taylor.Debevec@noaa.gov).

**SUPPLEMENTARY INFORMATION:** NMFS manages the Pacific sardine fishery in the U.S. exclusive economic zone off the Pacific coast (California, Oregon, and Washington) in accordance with the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). The FMP and its implementing regulations require NMFS to set annual catch levels for the Pacific sardine fishery based on the annual specification framework, control rules, and management measures in the FMP. These control rules, including the harvest guideline (HG) control rule, the overfishing limit (OFL) and acceptable biological catch (ABC) rules, along with other management measures are used to manage harvest levels for Pacific sardine, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1801 *et seq.*

This final rule implements the annual catch levels, reference points, and management measures for the 2023-2024 fishing year. The final rule adopts, without changes, the catch levels and restrictions that NMFS proposed in the rule published on May 16, 2023 (88 FR 31214). The proposed rule for this action included additional background on the specifications and details of how the Pacific Fishery Management Council (Council) derived its recommended specifications for Pacific sardine. Those details are not repeated here. For additional information on this action, please refer to the proposed rule (88 FR 31214, May 16, 2023).

This final rule implements an OFL of 5,506 metric tons (mt) and an ABC/annual catch limit (ACL) of 3,953 mt, based on CPS FMP control rules and a biomass estimate of Pacific sardine of 27,369 mt. This biomass estimate is from the 2022 update stock assessment, which was identified by the Council's Scientific and Statistical Committee (SSC) to represent the best scientific information available for management of Pacific sardine for this year. Per the CPS FMP, because the estimated biomass is less than 150,000 mt (*i.e.*, the Rebuilding target and CUTOFF in the harvest guideline control rule), the primary directed fishery is set to 0 mt, meaning there is no primary directed

fishery for Pacific sardine. This is the ninth consecutive year the primary directed fishery has been closed. Because the estimated biomass is below the minimum stock size threshold (50,000 mt), the FMP requires that incidental catch of Pacific sardine in other CPS fisheries be limited to an incidental allowance of no more than 20 percent by weight. Although these management measures, triggered by the FMP, are expected to keep catch far below the ACL as they have done in recent history, this rule also implements an annual catch target (ACT) of 3,600 mt and implements management measures intended to ensure harvest opportunity throughout the year.

A summary of the 2023-2024 fishing year specifications can be found in Table 1, and management measures are summarized in the list below Table 1.

**Table 1 – Harvest Specifications for the 2023-2024 Sardine Fishing Year in Metric Tons (mt)**

Biomass Estimate	OFL	ABC	HG	ACL	ACT
27,369	5,506	3,953	0	3,953	3,600

Following are the management measures for commercial sardine harvest during the 2023-2024 fishing year:

- 1) If landings in the live bait fishery reach 2,500 mt of Pacific sardine, then a 1 mt per-trip limit of sardine would apply to the live bait fishery.
- 2) An incidental per-landing limit of 20 percent (by weight) of Pacific sardine applies to other CPS primary directed fisheries (*e.g.*, Pacific mackerel).
- 3) If the ACT of 3,600 mt is attained, then a 1mt per-trip limit of Pacific sardine landings would apply to all CPS fisheries (*i.e.*, 1) and 2) would no longer apply).
- 4) An incidental per-landing allowance of 2 mt of Pacific sardine would apply to non-CPS fisheries until the ACL is reached.

All sources of catch, including any exempted fishing permit (EFP) set-asides, the live bait fishery, and other minimal sources of harvest, such as incidental catch in CPS and non-CPS fisheries and minor directed fishing, will be accounted for against the ACT

and ACL. At the April 2023 Council meeting, the Council approved 670 mt of the ACL for two EFP proposals to support stock assessments for Pacific sardine. NMFS published a notice of receipt of EFP applications on May 19, 2023 (88 FR 32200), and will decide whether to issue the EFPs after the comment period closes on June 20, 2023. If the effective date of this final rule is after July 1, 2023, any Pacific sardine harvested between July 1, 2023, and the effective date will count toward the 2023-2024 ACT and ACL.

The NMFS West Coast Regional Administrator will publish a notice in the **Federal Register** to announce when catch reaches the management measure limits, as well as any resulting changes to allowable incidental catch percentages. Additionally, to ensure that the regulated community is informed of any closure, NMFS will make announcements through other means available, including emails to fishermen, processors, and state fishery management agencies.

### **Comments and Responses**

On May 16, 2023, NMFS published a proposed rule for this action and solicited public comments through May 31, 2023 (88 FR 31214). NMFS received two public comments -- one from the industry group California Wetfish Producers Association (Association) and one from the environmental group Oceana. The Association supported the proposed rule in its entirety. After considering the public comments, NMFS made no changes from the proposed rule. NMFS summarizes and responds to the comment from Oceana below.

*Comment:* Oceana recommended that NMFS use a lower harvest rate ( $E_{MSY}$  or environmental maximum sustainable yield, which is used to calculate the OFL and ABC) of 5 percent to set specifications.

Oceana also appended to their comment a timeline of sardine management from 1967 to 1992. As this did not contain any recommendations, there is no response.

Lastly, Oceana attached a letter they sent to the Council in March 2023, which contained more specific recommendations to the Council for their consideration during the April 2023 Council Agenda Item H.4, 2023-2024 Pacific sardine annual catch limit and management measures. Those recommendations included: use an  $E_{MSY}$  of 5 percent; incorporate more buffer into the calculations for specifications; set the ACL no higher than 800 mt; and limit the incidental catch allowance to no more than 10 percent.

*Response:*

As it relates to the comment that NMFS should use an  $E_{MSY}$  of 5 percent to calculate the OFL and ABC, NMFS has determined that the OFL and ABC being implemented through this action will prevent overfishing and are supported by the best scientific information available, including the information used to calculate  $E_{MSY}$ . Additionally, the reference points proposed for the 2023-2024 fishing year were recommended by the Council's SSC, which they determined to represent the best available science for managing the fishery, and are based on the formulas in the CPS FMP, including the formula adopted for calculating  $E_{MSY}$ . In its comment, Oceana points to recent Council discussions related to  $E_{MSY}$ . NMFS notes in response that the Council's SSC – the scientific advisory body that is responsible for recommending changes to  $E_{MSY}$  – can (as it has done in the past) recommend changes to  $E_{MSY}$  at any time if the best available science warrants such a revision; it has not determined that a change to  $E_{MSY}$  is necessary at this time.

Oceana stated that the "...annual catch limit for 2023-24 is nearly twice the 2,200 mt annual catch NMFS assumed to support its conclusion that Amendment 18 would rebuild the sardine population..." To clarify, there are two stocks of Pacific sardine that can occur off the U.S. West Coast, known as the northern subpopulation and the southern subpopulation. The northern subpopulation, managed under the CPS FMP, is overfished and managed under the rebuilding plan (*i.e.*, Amendment 18 to the CPS FMP). The

southern subpopulation, not managed under the CPS FMP nor part of the rebuilding plan, usually resides off the coast of Mexico, but in the summer months migrates north into waters off southern California. While the two subpopulations generally inhabit different geographic ranges, they do typically mix in the summertime, and it is impossible to distinguish between the subpopulations at the time of landing. Therefore, in an abundance of caution, NMFS counts all landed Pacific sardine against the ACL (which is set based on the biomass of the northern subpopulation only), regardless of which subpopulation they might belong to. Additionally, this rule includes management measures that generally restrict the fishery from catching the full ACL. These non-discretionary restrictions include the continued closure of the primary directed fishery (*i.e.*, the largest fishery that takes the majority of Pacific sardine catch) and restrictions on incidental harvest of Pacific sardine in other CPS fisheries (which are currently less than half of typical incidental limits).

In its March 24, 2023, letter to the Council, Oceana referenced a 2019 paper in support of its contention that the temperature index being used to calculate  $E_{MSY}$  is flawed. NMFS is aware of the paper Oceana referenced and of ongoing Council discussions related to  $E_{MSY}$ . NMFS is committed to participating in discussions about new science and whether that science justifies a change to how  $E_{MSY}$  is calculated for management purposes. NMFS notes that research related to the appropriate temperature index to inform  $E_{MSY}$  is ongoing and points out that the paper Oceana cited does not suggest an alternative methodology for calculating  $E_{MSY}$ . NMFS has not yet determined whether, a change in how  $E_{MSY}$  is calculated is necessary for management purposes. As previously stated, NMFS has determined that the reference points set through this action are based on the best scientific information available.

Oceana stated that the  $E_{MSY}$  fishing rate and distribution factor NMFS used to calculate the OFL “...are overestimated, resulting in an inflated OFL that does not

prevent overfishing.” However, we note that overfishing has never occurred in this fishery, and the science supports NMFS’ determination that the OFL implemented through this action will prevent overfishing.

NMFS disagrees with Oceana’s suggestion to increase the buffer between OFL and ABC. The SSC recommended that the update stocks assessment upon which those reference points are based be deemed a Tier 2 assessment (meaning data moderate) and that a “staleness” factor be added to account for the time that has passed since the update assessment was conducted. The Council chose to use a  $P^*$  of 0.4, which is consistent with past years. The buffer between OFL and ABC for this year’s fishing season, 28.2 percent, is appropriately larger than the buffer between OFL and ABC for last year’s fishing season because the stock assessment used for decision-making, while being best scientific information available, is a year older or “staler.” The ABC being implemented through this action is from the Council’s SSC, which is responsible for making ABC recommendations to the Council and which bases its recommendations on the best scientific information available. NMFS also notes that, contrary to Oceana’s assertions, there have been no “indications of overfishing in several previous years” that would warrant a more precautionary approach to setting the ABC. NMFS has therefore determined that it is not necessary to further reduce the ABC from the OFL to prevent overfishing.

NMFS also disagrees with Oceana’s recommendation that the ACL should be no higher than 800 mt. The OFL/ABC/ACL were all calculated in alignment with the rebuilding plan. The reference points implemented through this action should also be viewed in the context of the non-discretionary harvest restrictions already in place, pursuant to the CPS FMP and the rebuilding plan for the northern subpopulation of Pacific sardine, which typically restrain the fishery from catching the full ACL. These non-discretionary restrictions include the continued closure of the primary directed

fishery (*i.e.*, the largest fishery that takes the majority of Pacific sardine catch) and restrictions on incidental harvest of Pacific sardine in other CPS fisheries (which are currently less than half of typical incidental limits). Recent catch of Pacific sardine (both northern and southern subpopulations) has been 1,769 mt in the 2021-2022 season, and so far 1,110 mt in the 2022-2023 season (ending June 30, 2023). The reference points being implemented through this action were recommended by the Council based on the control rules in the FMP and were endorsed by the Council's SSC as the best scientific information available for setting the 2023-2024 harvest specifications for Pacific sardine.

The Council considered the overfished status of Pacific sardine, as well as the "staleness" of the 2022 update assessment, and incorporated precautionary measures in their recommendations to NMFS to account for those factors. Those precautionary measures included: (1) deeming the assessment Tier 2 and adding an additional "staleness" factor to that buffer; (2) using a  $P^*$  value of 0.4; (3) reducing the ACT from the ACL; and (4) incorporating accountability measures. These accountability measures include: (1) limiting live bait landings to 1 mt per landing once 2,500 mt of sardine is attained; (2) imposing a per-trip limit of 1 mt of sardine in all CPS fisheries once the ACT is attained; and (3) implementing an incidental per-landing allowance of 2 mt in non-CPS fisheries until the ACL is reached.

As it relates to Oceana's recommendation that NMFS set the incidental catch allowance at 10 percent, NMFS notes that all harvest, regardless of how it is taken or at what level (*i.e.*, 10 percent or 20 percent), is accounted for under the OFL/ABC/ACL/ACT for this action, and these levels have been determined to prevent overfishing of Pacific sardine and support the rebuilding of the stock. Additionally, reducing the incidental catch allowance is not necessary to ensure these reference points are not exceeded, therefore NMFS does not see a justification to restrict this sector further than the low catch allowance already in place.



## **Classification**

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this final rule is consistent with the CPS FMP, other provisions of the MSA, and other applicable law.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in the date of effectiveness of these final harvest specifications for the 2023-2024 Pacific sardine fishing season. In accordance with the FMP, this rule was recommended by the Council at its meeting in April 2023. The contents of this rule are based on the best scientific information available on the population status of Pacific sardine, which became available at that April 2023 meeting. Making these final specifications effective on July 1, the first day of the fishing year, is necessary for the conservation and management of the Pacific sardine resource because last year's restrictions on harvest are not effective after June 30, 2023. The FMP requires a prohibition on primary directed fishing for Pacific sardine for the 2023-2024 fishing year because the sardine biomass has dropped below the CUTOFF. The purpose of the CUTOFF in the FMP, and for prohibiting a primary directed fishery when the biomass drops below this level, is to protect the stock when biomass is low and provide a buffer of spawning stock that is protected from fishing and can contribute to rebuilding the stock. If these specifications are not effective by July 1, there would be no prohibition on the primary directed fishing, and a significant amount of sardine could theoretically be caught in a short period.

Delaying the effective date of this rule beyond July 1 would be contrary to the public interest because it would jeopardize the sustainability of the Pacific sardine stock. Furthermore, most affected fishermen have already been operating under a prohibition of the primary directed fishery for years, and are aware that the Council recommended that primary directed commercial fishing be prohibited again for the 2023-2024 fishing year, and are fully prepared to comply with the prohibition.

This final rule is exempt from review under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities for the purposes of the Regulatory Flexibility Act. The factual basis for the certification was published in the proposed rule (88 FR 31214, May 16, 2023) and is not repeated here. As a result, a final regulatory flexibility analysis was not required and none was prepared.

Pursuant to Executive Order 13175, this rule was developed after meaningful consultation and collaboration with the Council's tribal representative, who has agreed with the provisions that apply to tribal vessels.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act. There are no relevant Federal rules that may duplicate, overlap, or conflict with the action.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: June 20, 2023.

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[FR Doc. 2023-13416 Filed: 6/22/2023 8:45 am; Publication Date: 6/23/2023]